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Supreme Court of the United States

October Term, 1958

No. 136

JAMES ALONZO DRAPER,

Petitioner,

vs.

UNITED STATES OF AMERICA

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the District Court denying petitioner's motion to suppress is reported at 147 F. Supp. 689; the opinion of the Court of Appeals at 248 F. 2d 295.

Jurisdiction

The judgment of the Court of Appeals was entered on September 12, 1957 (R. 36). Timely application for rehearing was denied October 23, 1957 (R. 37). Mr. Justice Whittaker on November 14, 1957 granted an extension to December 20, 1957 within which to file a petition for certiorari (R. 38). The petition for certiorari was filed on December 16, 1957 and was granted on June 30, 1958 (R. 38). Jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254.

Constitution and Statutes Involved

The Fourth Amendment to the Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The statute under which the arrest of petitioner is sought to be justified reads as follows:

> Section 7607(2), Title 26, United States Code:
> [Agents of the Bureau of Narcotics may]
>
> "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

The statute under which petitioner was convicted reads:

> Section 174, Title 21, United States Code:
>
> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal

Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Questions Presented

1. Is an arrest without warrant valid when the arresting officer's only information with regard to violation of law was hearsay?

2. Is an arrest without warrant valid when the arresting officer's only information with regard to violation of law came from an informer and the facts upon which he based his information were not disclosed either to the officer or before the court?

3. Is an arrest without warrant valid when the arresting officer had no information that a law had actually been violated?

4. Did the courts below err in denying petitioner's motion to suppress the evidence taken from him at the time of his arrest?

5. Did the court below err in affirming petitioner's conviction?

Statement

Petitioner was indicted for fraudulent receipt, transportation and concealment of heroin illegally imported into the United States, with knowledge of such unlawful importation (R. 1). Prior to trial he moved to suppress evi-

dence seized from him at the time of his arrest (R. 1, 2). That motion was denied (R. 21) and the seized material was received at the trial (R. 27). Petitioner was convicted and sentenced to imprisonment for 10 years (R. 22). He is now serving that sentence.

At the hearing on the motion to suppress only the arresting agent, one Marsh, testified with regard to probable cause (R. 7-11). He had had no prior knowledge of petitioner whatever (R. 11). The arrest was occasioned by information received by one Hereford, described as a "special employee" of the Bureau of Narcotics (R. 8). This meant that, from time to time, Hereford furnished information for which he was paid small sums of money (R. 10). Marsh testified that the information previously given by Hereford had always been reliable (R. 10). Hereford had died before the hearing (R. 8).

Marsh testified that on September 3, 1956, Hereford told him that petitioner lived at a certain address in Denver and was peddling heroin (R. 8). Nothing appears to have been done by the agents after receipt of that information. Then, on September 7, Hereford told the witness that petitioner had gone to Chicago to bring back heroin and would return either the next day or the day after (R. 8). Hereford described petitioner's appearance and clothing to Marsh, and stated that he was carrying a light tan zipper bag and habitually walked very fast (R. 8, 9). It is significant that Marsh gave no testimony in respect to the basis for Hereford's conclusion that petitioner was a narcotics peddler or his belief that petitioner was going to bring heroin back from Chicago. Nor did Marsh receive any information that petitioner had actually acquired any heroin or that what he did acquire had been illegally imported or that he knew this.

Marsh, acting on the information he received, then watched incoming trains on both days referred to by Hereford and, on the second day, noticed a man answering the

description given him (R. 9). Marsh and another officer then physically apprehended petitioner, removed a billfold from his pocket and so discovered his name and then placed him under arrest (R. 9, 11). Petitioner's hand was removed from his pocket and bags found in his fist which contained heroin (R. 12). The zipper bag contained a syringe (R. 10, 13). These are the articles with which the motion was concerned (R. 2). They were put in evidence at the trial (R. 26, 27).

Marsh testified that he had known nothing about petitioner except what he had learned from Hereford:

> "Q. In other words, if it wasn't for this informer, there would be absolutely no facts that you personally knew that would give grounds for probable cause to arrest this man, all the facts you have were gained from his informer, is that not right? A. That's right. That is where the information came from" (R. 11).

Summary of Argument

An arrest without warrant is not justified when the arresting officer has no knowledge of the facts supporting an inference of probable cause and acts entirely upon hearsay. Especially is this the case when the hearsay consists solely of a conclusion stated by an informer without any particulars having been disclosed to the arresting officer, or even, later, to the court.

Here, moreover, the only information given to the arresting officer was that petitioner intended to commit a crime. The informer had no knowledge that a crime had in fact been committed and did not purport to advise the officer that it had.

Under such circumstances the motion to suppress the material taken at the time of arrest should have been granted and the evidence rejected at the trial. Consequently petitioner's conviction should be reversed.

POINT I

Arrests without warrant are justified only if there is probable cause that a crime has been committed.

This Court has repeatedly pointed out that arrests and searches without warrant are the exception. Whenever feasible it has required officers to obtain warrants and has reversed convictions when this had not been done: *Johnson* v. *United States*, 333 U. S. 10; *Jones* v. *United States*, 357 U. S. 493.

As Mr. Justice Jackson said in *Johnson* (at p. 13):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."

An arrest without warrant may not rest on suspicion, but only on "probable cause" (*Brinegar* v. *United States*, 338 U. S. 160) or, as the statute here relied on by the government provides (26 U. S. C. § 7607-2) on "reasonable grounds". We submit these criteria are identical—otherwise the statute itself would be in violation of the Fourth Amendment.

Here, as we shall show, no probable cause existed.

POINT II

No facts were known to the arresting officer which justified an arrest.

This Court has indicated that less may be needed to justify the issuance of a warrant than to sustain an arrest without warrant (*Johnson* v. *United States, supra,* at 13). But it is clear that an arrest without warrant is not justified when the facts are not sufficient to authorize the issuance of a warrant: *United States* v. *Di Re,* 332 U. S. 581, 587; *United States* v. *Lefkowitz,* 285 U. S. 452, 464; *Brown* v. *United States,* 4 F. 2d 246 (9th Circuit); *Wakkuri* v. *United States,* 67 F. 2d 844 (6th Circuit); *Worthington* v. *United States,* 166 F. 2d 557 (6th Circuit); *Wrightson* v. *United States,* 222 F. 2d 556 (D. C. Circuit); *United States* v. *Castle,* 138 F. Supp. 436 (D. C. D. C.).

It can hardly be doubted that the facts known to Marsh were not sufficient to justify his obtaining a warrant of arrest. The only information he had came from an informer who, so far as here appears, did not disclose the source of his information, nor even indicate that a crime had in fact been committed, only that one was going to be committed.

This is not sufficient on any one of the following grounds: An arrest may not be made only on hearsay information; an arrest may not be made when the informant does not disclose the basis for his conclusion or where the information merely is that a crime is being planned.

1. Whether hearsay alone can support an arrest without warrant has never been passed upon by this Court, although in *Scher* v. *United States,* 305 U. S. 251, 254, the Court was careful to note that the search there did not depend on hearsay. A search was held void in *United States* v. *Turner,* 126 F. Supp. 349 (D. Md.) because it rested only on hearsay.

This Court's comment on the use of hearsay in *Brinegar* v. *United States, supra,* at 174, n. 13, related only to the use of hearsay to support a warrant. That is vastly different from the use of hearsay to justify an arrest without a warrant. In the one case, before an arrest can be made, the decision as to the sufficiency and reliability of the information is passed upon by a judicial officer; in the other, only by the arresting agent. What has already been quoted from *Johnson,* supports this view.

2. We can here, however, rest on the proposition that if hearsay is relied on the basis for the hearsay must be disclosed, and that it is necessary that the hearsay indicate the actual commission of a crime. This proposition is supported by the following cases.

In *United States* v. *Bianco,* 189 F. 2d 716 (3d Circuit), the agent who made the arrest received information from another agent who had personal knowledge of the facts that indicated that a crime had been committed. The court held that the government was entitled to rely on this knowledge but that it must be scrutinized. Otherwise, in effect, the arresting agent could pull himself up by his bootstraps. The decision of the District Court there, 94 F. Supp. 239, was reversed only because the facts observed by the second agent and testified to by him at the hearing were sufficient. Cf. *United States* v. *Gowen,* 40 F. 2d 593 (2d Circuit), where an arrest was upheld because the informer had given particulars showing the commission of an offense. (The holding that the search was reasonable was reversed, *sub nom. Go-Bart Importing Co.* v. *United States,* 282 U. S. 344.)

In *United States* v. *Clark,* 29 F. Supp. 138 (W. D. Mo.), the court granted a motion to suppress where the only evidence was that the arresting agent had seen defendant leave a store where it was known narcotics were sold and enter a car in which a reliable (and identified) informer was seated, who signaled that defendant was in possession

of narcotics. But it did not appear how the informer knew this. Judge Otis said at page 140:

> "It seems to us that the Fourth Amendment to the Constitution, U. S. C. A., is whittled away to nothingness if it is held that a citizen may be arrested and searched without a warrant of arrest or a search warrant if only it is shown that some reliable informer has said the citizen has committed or is committing a felony, without any showing whatever (and there was none here) that the informer's information was itself more than mere guess-work and speculation."

Many cases have announced the principle that reliance on information from an informer is not enough. While stress is laid in some of the opinions on the fact that the identity of the informer was not disclosed, we suggest that the real basis for these decisions is that the basis for the informer's conclusion that a crime had been committed was not disclosed: *Brown* v. *United States, supra; Wisniewski* v. *United States,* 47 F. 2d 825 (6th Circuit); *Contee* v. *United States,* 215 F. 2d 324 (D. C. Circuit); *Wrightson* v. *United States, supra; United States* v. *Baldocci,* 42 F. 2d 567 (S. D. Cal.); *United States* v. *Blich,* 45 F. 2d 627 (D. Wy.); *United States* v. *Tom Yu,* 1 F. Supp. 357 (D. Ariz.); *United States* v. *Vleck,* 17 F. Supp. 110 (D. Nebr.); *United States* v. *Castle, supra.*

The *Tom Yu* case, *supra,* is particularly significant since there, as here, an essential element of the crime was illegal importation and the facts did not justify any inference to that effect. In *Grau* v. *United States,* 287 U. S. 124, this Court held a search warrant bad because the affidavit on which it was based did not indicate that a dwelling was used for the sale of liquor, Congress having limited search warrants of dwellings to such cases. Cf. *United States* v. *Office No. 508 Recou-Brewster Bldg.,* 119 F. Supp. 24 (N. D. La.), where a search warrant was quashed because the affidavit said nothing about the non-payment of the gambling tax which was essential to the offense.

Pertinent in this connection is the recent case of *Giordenella* v. *United States*, 357 U. S. 480. There the Court voided an arrest made on a sworn complaint because it contained only conclusions, not facts. The case at bar is even stronger. In *Giordenella* the complaint charged that a crime had in fact been committed on a certain day, whereas here all the informer was able to advise the arresting officer was that the suspect "was going to bring back" heroin in the future (R. 8).

Indeed, the majority in the court below appear to have recognized the infirmity of reliance on the informer's tip alone. For Chief Judge Bratton said:

> "Information coming to an agent of the Bureau of Narcotics from an anonymous, undisclosed, or unverified source, standing alone and without more, is not enough to furnish such agent reasonable grounds to believe that a person has committed or is committing a violation of the Narcotics Act, and therefore may be arrested and searched without authorizing process. * * *" (248 F. 2d at 298).

But in finding support for their conclusion the majority referred to "details" given by the informer and to "verification" of them by the arresting agent. However, these "details" related only to the identification of petitioner, not to his involvement in crime. (No testimony whatever was given at the hearing with regard to the informer's basis for his tip in this respect.) The "verification" rose no higher than the information. As was held in *Clark*, *supra*, that is not enough.

Moreover, as Judge Huxman, dissenting below, so graphically stated (248 F. 2d at 302), the arresting agent had no information whatever that any crime had actually been committed. He had merely been told that petitioner was going to Chicago to acquire heroin, not that he had actually acquired it. No attempt appears to have been made to have petitioner followed either in Denver after September 3rd, when Marsh first heard of him (R. 16, 17),

or in Chicago on September 7th, when Marsh was told he was there (R. 17).

Moreover, Marsh, the arresting agent, had no notion whatever at the time of arrest whether petitioner had been able to accomplish his objective. For all that Marsh knew, or had been told, petitioner was returning empty-handed when arrested. That is an arrest on suspicion alone and cannot be sustained.

The court below is not supported by the cases it cited (248 F. 2d at 299), since in each of them some facts were observed by the arresting officers which justified an inference of criminal activity.

In *King* v. *United States*, 1 F. 2d 931 (9th Circuit), the agents observed a car traveling with curtains drawn in the early morning hours. In *Coupe* v. *United States*, 113 F. 2d 145 (D. C. Circuit), cert. den. 310 U. S. 651, the officers saw defendant put a bag in his car containing pads which were of the kind used in lottery transactions. In *United States* v. *Li Fat Tong*, 152 F. 2d 650 (2d Circuit), defendant dropped a bottle from which the odor of narcotics emanated as it broke. In *United States* v. *Bianco, supra* (3rd Circuit), one of the agents testified to personal observation of defendant at a place where lottery tickets were sold in company with distributors and that defendant was given a large suitcase. As to *United States* v. *Walker*, 246 F. 2d 519 (7th Circuit), the search was justified because a moving automobile was involved. Moreover, in each of those cases the information received was to the effect that a crime had already been committed, not, as here, that it was only planned.

To the extent that any of these cases may not be distinguishable, we suggest, however, that they are not sound and should not be approved by this Court.

Conclusion

The holding below conflicts with the principles laid down by this Court in *Grau*, *Johnson* and *Giordenella*, *supra*, and by the Courts of Appeals for the Second, Third, Sixth, Ninth and District of Columbia Circuits in *Gowen*, *Bianco*, *Wisniewski*, *Brown* and *Contee*, respectively, *supra*.

Accordingly, the judgment of affirmance should be reversed.

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